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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM

NO. .....

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

CHARLES EDWARD WEBB,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner Charles Edward Webb, who was the defendant in the United States District Court for the Eastern District of Tennessee and who was the appellant in the United States Court of Appeals for the Sixth Circuit, respectfully shows unto the Court:

I

That he is much aggrieved by the opinion and order of the Honorable United States Court of Appeals for the Sixth Circuit entered in this cause under date of April 5, 1971* whereby the Honorable United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Eastern District of Tennessee, Northeastern Division, upon petitioner's conviction in a jury trial of possessing a rifle which had not been registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §§5861(d), 5871 as amended in 1968, as averred in an indictment returned against your petitioner.

II

The indictment under which petitioner was convicted in the United States District Court reads as follows:

> "The grand jury charges that on or about the 8th day of October, 1969, in the Eastern District of Tennessee, Northeastern Division, Charles Edward Webb wilfully and knowingly possessed a firearm, that is, a .22 caliber Remington rifle, having a barrel length of eleven and seven eighths inches and an overall length of twenty and three quarter inches, which had not been registered to him in the National Firearms Registration and Transfer record as required by Chapter 53, Title 26, United States Code, in violation of Section 5861 (d) and 5871, Title 26, United States Code." (tr. 6-7, A. 7).

Upon a plea of not guilty to said indictment, the case was tried to a jury, and defendant-petitioner was by the

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* Appendix A hereto.

jury found guilty, and the District Judge entered judgment sentencing the defendant to two years confinement in the penitentiary, but suspending the sentence except as to six months.

Defendant-petitioner filed his appeal and assigned errors, and the Honorable District Court was by the Honorable Court of Appeals for the Sixth Circuit affirmed in all things.

III

The jurisdiction of this Honorable Court is invoked under the following jurisdictional factors:

(1) This Honorable Court has jurisdiction to review a conviction in a Federal District Court under a Federal statute.

(2) This Honorable Court has appellate jurisdiction to review the case to determine if petitioner's rights under the United States Constitution have been violated in manner hereinafter asserted.

IV

Petitioner respectfully insists that the learned Court of Appeals for the Sixth Circuit was in error in affirming the judgment of the Honorable District Judge, and in not reversing the judgment of the District Court and dismissing the case, upon the following issues raised by assignment of errors filed by your petitioner in the said Honorable Court of Appeals, to-wit:

Issue One. Was the prosecution against defendant-petitioner absolutely barred because the Federal firearms statute deprived defendant-petitioner of his right against self-incrimination under the Fifth Amendment to the United

States Constitution? The Honorable Court of Appeals said, "No." Petitioner says, "Yes."

Issue Two. Is the indictment bad for vagueness and failure to state a crime against which the defendant could or was required to defend him, and for the reason that the indictment does not charge that defendant-petitioner had knowledge of the fact that the weapon in question was not registered to him? The Honorable Court of Appeals said, "No." Petitioner says, "Yes."

Issue Three. Did the government fail to prove venue in the case? The Honorable Court of Appeals said, "No." Defendant-petitioner says, "Yes."

Issue Four. Was the defendant deprived of his rights under the Fifth and Sixth Amendments to the United States Constitution by the government's introduction into evidence of a certificate of James B. Cain (who did not appear in court as a witness) certifying the results of his search of the government firearms registration record because the statute authorizing the admission into evidence of such document (a) deprived defendant-petitioner of his right against self-incrimination, and (b) deprived defendant-petitioner of the right to confront and cross-examine said witness?

The Honorable Court of Appeals said, "No." Defendant-petitioner says, "Yes."

V

THE PREMISES CONSIDERED, petitioner prays that a writ of certiorari, for which this is the first application, issue from this Honorable Court to the Honorable United States Court of Appeals for the Sixth Circuit, directing said Court, and the Clerk thereof, to certify and transmit

to this Court the entire record and proceedings in this case, including the opinion and decree of the Honorable Court of Appeals; that this case be placed upon the docket of this Court for argument, and that the decree of the said Court of Appeals, affirming the District Judge, be reviewed and reversed; that the errors complained of be corrected; that justice be done; and for general relief. Petitioner also prays that the writ of supersedeas issue staying mandate by the Honorable Court of Appeals of the Sixth Circuit until the Court considers this petition and reviews the case under this petition.

Respectfully submitted,

LODGE EVANS,
Arcade Building,
Elizabethton, Tennessee 37643,

Attorney for Charles E. Webb,
Defendant-Petitioner.

NOTICE OF FILING

TO HONORABLE JOHN L. BOWERS, JR.
United States Attorney
Federal Post Office Building
Knoxville, Tennessee 37901

Notice is hereby given that Charles Edward Webb, defendant-petitioner, is filing the foregoing petition for the writ of certiorari, together with the Supporting Brief attached, in the United States Supreme Court, and that the same is being placed in the United States mail, addressed to the Clerk of the United States Supreme Court, for filing, as of the date of the certificate filed herewith. This May 1, 1971.

LODGE EVANS,
Attorney for Charles E. Webb,
Defendant-Petitioner.

SUPPORTING BRIEF

STATEMENT OF THE CASE

Sufficient facts concerning the case are stated in the petition for the writ of certiorari, hereinbefore set forth, for a consideration of the issues raised by the petition for the writ of certiorari.

ARGUMENT AND SUPPORTING AUTHORITY

Issue One Considered

The question as to the violation of petitioner's rights against self-incrimination under the Fifth Amendment to the United States Constitution, and that the prosecution for this reason was absolutely barred, was only broadly brought to the attention of the District Judge in defendant-petitioner's concluding statement of his Motion to Suppress Evidence, as follows: "Wherefore, this defendant respectfully moves the Court to suppress said proposed evidence for the reason that it is being offered in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States" (A. 6).

However, this is sufficient, and the question may be raised for the first time on appeal, as failure to raise the issue at the trial level is not a waiver of the constitutional right. *Greenwood v. United States*, 4th Cir. 1968, 392 F.2d 558; *Grosso v. United States*, 88 S. Ct. 716; *United States v. Miller*, 4th Cir., 406 F.2d 1100, 1105; and *Russell v. United States*, 9th Cir., 306 F.2d 402.

The section of the firearms statute under which defendant-petitioner was convicted reads in pertinent part as follows:

USCA, Title 26, Section 5861. Prohibited Acts
It shall be unlawful for any person—

* * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration Transfer record; or ****

In the case of *Haynes v. United States*, 88 S. Ct. 722, 729, 390 U.S. 85, 95, this Honorable Court held the firearms statute constitutional, but further held that when an accused raises as a defense his right against self-incrimination, the prosecution is barred as being violative of the accused's right against self-incrimination as to those sections of the statute providing for a registration of firearms. The Court in the *Haynes* case, 88 S. Ct. at 730, said: "The hazards of incrimination created by the registration requirement can thus only be termed 'real and appreciable.'"

Since the issue involves a constitutional right, it may be raised for the first time on appeal. *Depugh v. U. S.*, 8th Cir., 401 F.2d 346; *Dillon v. United States*, 389 F.2d 381; *Sizemore v. United States*, C.A. 8th, 1968, 393 F.2d 656; *United States v. Miller*, C.A. 4th, 406 F.2d 1100.

Issue Two Considered

Defendant contends that the indictment is vague and confusing, and does not state an offense against which the defendant could properly defend himself, and further the indictment attempts to enforce a statute which deprives defendant of his constitutional right against self-incrimination. The indictment is shown at page 7 of the Appendix. The District Judge held the indictment to be adequate.

The indictment is vague and confusing in that it refers broadly to the entire firearms statute in these words:

" ... as required by Chapter 53, Title 26, USC, in violation of Section 5861(d) ..." Section 5841, Title 26, requires every person possessing a firearm to register the same, and further provides that a person shall not be required to register a firearm made by a person or which he acquired by transfer and importation. Section 5841(b) of the Supplement USC requires the manufacturer, importer, and maker to register the firearm to the transferee. Section 5861(d), Title 26, U.S.C., makes it unlawful to receive or possess a firearm not registered. Different defenses could be made under each of these sections. This makes the indictment vague and confusing and not sustainable. *Russell v. United States*, 9th Cir. 1962, 306 F.2d 403, 407; *Russell v. United States*, 82 S. Ct. 1038, 1046-1048, 369 U.S. 749, 763-764, 8 L. Ed. 2d 240; *Sutton v. United States*, 5th Cir., 157 F.2d 661.

There are two elements of offenses of this kind under the firearms act, namely, (a) possession of the firearm, and (b) failure to register. *Haynes v. United States*, 88 S. Ct. 722, 729. An indictment must state all elements of the crime, and if one element is left out, the indictment cannot stand. *Honea v. United States*, 5th Cir. 1965, 344 F.2d 798, 803-804; *Russell v. United States*, 369 U.S. 749, 763-764, 82 S. Ct. 1038, 8 L. Ed. 2d 200; *Babb v. United States*, 5th Cir., 218 F.2d 538, 539. The indictment in this case charges the first element "wilfully and knowingly possessed a firearm," but it fails to charge that the defendant ***knew*** the firearm was not registered to him or knowingly failed to have same registered to him, which is the second element of the offense, but merely recites that the described rifle was not registered to the defendant. The indictment must charge that the defendant had such knowledge to be good. *Standard Oil Co. of Texas v. United States*, C.A. 5th Cir., 307 F.2d 120,

130. Felonious knowledge (knowingly doing or failing to do an act) is an essential ingredient of such a crime. *Hughes v. United States*, 1st Cir., 338 F.2d 651; and *Hughes v. United States*, 1st Cir., 340 F.2d 609. The indictment attempts to deprive the defendant of his rights against self-incrimination under the Fifth Amendment to the U. S. Constitution. *Dillon v. U. S. A.*, C.A. Mo. 1968, 389 F.2d 389; *Sizemore v. U. S.*, C.A. 8th 1968, 393 F.2d 656; *U. S. v. Miller*, C.A. 4th, 406 F.2d 1100; *Haynes v. United States*, 390 U.S. 85, 88 S. Ct. 722.

Issue Three Considered

We say the government failed to prove venue. Venue, place of crime and place to be tried, are absolute rights. *Gates v. United States*, 122 F.2d 571, cert. denied 62 S. Ct. 478, 314 U.S. 698, 86 L. Ed. 558. The government must prove venue. *Dean v. United States*, 246 F.2d 335.

The only proof of venue is the testimony of Deputy Sheriff Dave Roe, which reads as follows:

"Q Mr. Roe, as chief deputy sheriff, sir, did you have an occasion to be on duty on October 8th, 1969? (A. 16)

"A Yes, sir, I was.

"Q And on that date, sir, did you have an occasion to come in contact with the defendant Mr. Charles Edward Webb?

"A Yes, sir, I did.

"Q And approximately what time was that, sir?

"A Approximately 11:30 p.m.

"Q And where was that, sir? (A. 17)

"A That was approximately a mile and a quarter north of Elizabethton on what is known in Carter County as the Old Stoney Creek Highway.

"Q Is that in Carter County, Tennessee, sir?

"A Yes, sir, it is." (A. 17)

Defendant respectfully submits that this is not sufficient to establish venue. There is no proof to show that this was in the Eastern District of Tennessee, Northeastern Division, which is the territorial jurisdiction of the District Court in which defendant was tried. The jury would have had to know from personal knowledge or guessed that Carter County is in the Eastern District of Tennessee.

Issue Four Considered

The government introduced a certificate by James B. Cain, keeper of the Federal firearms registry, certifying that there was no evidence found that a weapon made from a .22 Remington rifle, with certain dimensions, was registered to Charles Webb (A. 26-27). The document is admissible into evidence under Federal statutes, Title 28, Sec. 1732d and 1733, U.S.C., and Title 26, Section 893 A, U.S.C. No objection to the admission of the document was registered at the trial. However, constitutional rights may be raised on appeal for the first time, as "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights, and courts "do not presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; *U. S. v. Miller*, 4th Cir. 1969, 406 F.2d 1101, 1105. Also, see *Greenwood v. U. S.*, 392 F.2d 558; and *Grosso v. U. S.*, 88 S. Ct. 716.

Defendant respectfully insists that the statutes which authorize the admission of such a document into evidence

deprived him of his right against self-incrimination under the Fifth Amendment to the U. S. Constitution. See *Haynes v. United States, supra.*[1]

It is further insisted by defendant that the admission of said document into evidence, and the statute permitting the introduction of the same, deprived him of his right to confront the witness James B. Cain in violation of his right under the Sixth Amendment, United States Constitution, whereby it is provided that an accused has the right to be confronted by the witnesses. See *Salinger v. United States*, 272 U.S. 542, 548, 47 S. Ct. 173, 175, 71 L. Ed. 398; *Mattox v. United States*, 156 U.S. 237, 243, 15 S. Ct. 337, 39 L. Ed. 409; *Roberts v. Baldwin*, 165 U.S. 275, 281-282, 17 S. Ct. 326, 41 L. Ed. 715; *Kirby v. United States*, 174 U.S. 47, 61, 18 S. Ct. 574, 43 L. Ed. 890.

Defendant had no opportunity to cross-examine the witness James B. Cain regarding his alleged search of the federal firearms registry, and he was deprived of a most important right to confront this witness.

SUMMARY AND RELIEF

Petitioner-defendant respectfully insists that the writ of certiorari should by this Honorable Court be awarded; that the decree of the Honorable Court of Appeals for the Sixth Circuit should be reversed; and that the prosecution against petitioner should be dismissed for the reason that his rights under the United States Constitution, as hereinbefore stated, have been violated; or in the alternative,

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[1] See also **Depugh v. U. S.**, 8th Cir., 401 F.2d 346; **Dillon v. United States**, C.A. Mo. 1968, 389 F.2d 381; **Sizemore v. United States**, C.A. 8th 1968, 393 F.2d 656; **United States v. Miller**, C.A. 4th, 406 F.2d 1100.

that the case be reversed and remanded for a new trial under Issue Four for the reason that the conviction has no proof to sustain it without the document referred to under the discussion of Issue Four.

Respectfully submitted,

LODGE EVANS,
Arcade Building,
Elizabethton, Tennessee 37643,

Attorney for Defendant-Petitioner,
Charles Edward Webb.

APPENDIX A

No. 20,822

UNITED STATES COURT OF A
FOR THE SIXTH CIRCUPPEALS
:T

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES EDWARD WEBB,

Defendant-Appellant.

FILED

APR 5 1971

ARL W. REUSS, Clerk

O

:DER

Before: EDWARDS, CELEBREZZE and
Circuit Judges.

BROOKS,

This is an appeal from the United St
Eastern District of Tennessee, Northes District Court,
Appellant was convicted in a jury trial ern Division.
rifle which had not been registered to hi him in the National
Firearms Registration and Transfer Re ecord in violation
of 26 U.S.C. §§5861(d), 5871 as amende ded in 1968.

Appellant was lawfully arrested on a a state charge of
disorderly conduct after threatening dur iring a quarrel to
use a rifle he had in his possession. T The rifle seized on
his arrest is the subject evidence in this is prosecution for
possession of an unregistered rifle. N Numerous errors
are alleged as to the admission and excl clusion of evidence
and as to the Court's standard charge to o the jury. Also,

Appellant contends that certain of his due process rights were violated by the Government's failure to prove that he possessed an unregistered rifle knowing it to be unlawful.

This case was submitted on briefs without oral argument. We have carefully reviewed the record and the briefs and find each of the alleged errors raised by the Appellant to be without merit.

It is ORDERED that the judgment of the District Court is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss,
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1673

CHARLES EDWARD WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of having possessed a rifle which had not been registered to him in the National Firearms Registration and Transfer Record, in violation of 26 U.S.C. (Supp. V) 5861(d) and 5871, as amended in 1968. On August 20, 1970, petitioner was sentenced to a two-year term of imprisonment, suspended except as to six months, and was placed on probation

for a period of three years. The court of appeals affirmed without oral argument (Pet. 13-14).

At approximately 11:30 p.m. on October 8, 1969, David Roe, the Chief Deputy Sheriff of Carter County, Tennessee, received a call that petitioner and some women were fighting at a place on "Old Stoney Creek Road." As Sheriff Roe and three other officers arrived on the scene, petitioner came out of a house carrying a sawed-off or short barrel rifle. When his wife shouted something to petitioner from the door of another house, petitioner threatened to shoot her if she did not go inside. As Sheriff Roe started to get out of his car, petitioner ordered him to leave his property, although the officer was not then on his property. Petitioner advanced and put the rifle on the hood of the police automobile. After a further altercation between petitioner and another woman at the scene, the officers arrested petitioner on a charge of disorderly conduct; at this time, they confiscated the rifle, which was found to be loaded (Tr. 10-13, 17-18, 20, 23-27).

Subsequently, Special Investigator James R. Beeler of the Alcohol, Tobacco, and Firearms Division of the Treasury Department was notified about the rifle, and the present charges under the Gun Control Act of 1968 resulted. At trial, Special Investigator Beeler testified that, after being advised of his rights, petitioner told him that the rifle in question had been acquired by him approximately two years previously in trade for a used car (Tr. 33-36).

An affidavit, certified by James B. Cain, Firearms Enforcement Officer in charge of the National Fire-

arms Registration and Transfer Record, was admitted without objection into evidence. The affidavit stated that a diligent search of the records of which Cain had custody and control had revealed no evidence that a firearm of the description alleged was registered to petitioner or that petitioner acquired the weapon by lawful making, transfer, or importation (Tr. 41-43).

1. Petitioner asserts that his prosecution was barred because the federal firearms statute, as amended in 1968, violates his privilege against self-incrimination. The contention is fully answered by the decision of this Court in *United States* v. *Freed*, No. 345, decided on April 5, 1971.

2. Petitioner attacks the sufficiency of the indictment on the ground that it was impermissibly vague. It is clear from a reading of the indictment,[1] however, that it charged the essential elements of the offense and adequately apprised petitioner of the charge against him; he was able to prepare his defense and conviction would bar further prosecutions for the same offense. See *Russell* v. *United States*, 369 U.S. 749; *United States* v. *Debrow*, 346 U.S. 374, 378.

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[1] The indictment reads:

> The Grand Jury charges that on or about the 8th day of October, 1969, in the Eastern District of Tennessee, Northeastern Division, Charles Edward Webb wilfully and knowingly possessed a firearm, that is, a .22 caliber Remington rifle, having a barrel length of 11-7/8 inches and an overall length of 20-3/4 inches, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Sections 5861(d) and 5871, Title 26, United States Code.

Moreover, as the trial judge noted in denying petitioner's motion to dismiss, he could have moved for a bill of particulars if he had any doubts as to the specifics of the charge.

Petitioner claims that the trial court erred in failing to dismiss the indictment for absence of an allegation of *scienter*. This too is answered by *United States* v. *Freed, supra*, where the Court held that the statute does not require specific proof of knowledge that the firearm was unregistered (slip op. at 6). See also the concurring opinion of Mr. Justice Brennan in *Freed supra*, slip op. 7. Petitioner was obviously aware that he was in possession of the rifle, and no more was required to show violation of the statute.

3. There is no merit to the claim that the government failed to prove that the venue was proper. Both the Sheriff and the Deputy Sheriff sufficiently described the location as in Carter County, Tennessee, "approximately a mile and a quarter north of Elizabethon on what is known in Carter County as the 'Old Stoney Creek Highway' " (Tr. 10, 23). The trial judge could take judicial notice, and the jury drawn from the area could conclude, that Carter County is part of the Eastern District of Tennessee. See *United States* v. *Graves*, 428 F. 2d 196, 201 (C.A. 5); *United States* v. *Lukenbill*, 421 F. 2d 849, 850 (C.A. 9); *United States* v. *Harris*, 331 F. 2d 600, 601 (C.A. 6).

4. Notwithstanding the lack of objection at trial, petitioner contends that it was constitutional error to have permitted introduction of the certificate regarding the results of the search of the government fire-

arms registry. It is well established, however, that an affidavit by an officer having custody of official records as to the lack of a certain record after diligent search is admissible to show the absence of such record or entry and is not violative of the constitutional right of confrontation. *E.g.*, *United States* v. *Thompson*, 420 F. 2d 536, 544-545 (C.A. 3); *Hollingsworth* v. *United States*, 321 F. 2d 342, 352 (C.A. 10); see also Rules 26 and 27, F. R. Cr. P.; *Salinger* v. *United States*, 272 U.S. 542, 547-548.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 425591 659